

May 18, 2007

Mr. Edward A. McCormick
2001 South "L" Street
Elwood, IN 46036

*Re: Informal Inquiry Response; Alleged Violation of the Open Door Law by the
Elwood Community School Corporation*

Dear Mr. McCormick:

You filed a formal complaint alleging that the Elwood Community School Corporation ("School") violated the Open Door Law by holding an executive session for a purpose that is not covered in the Open Door Law. I assigned #07-FC-102 to that complaint. I found that you did not have standing to file a formal complaint alleging a denial of access to a meeting that you were not excluded from and actually attended. However, I can issue an informal inquiry response under Indiana Code 5-14-4-10(5). Accordingly, I am issuing this informal inquiry response in lieu of a formal advisory opinion.

You allege that the School violated the Open Door Law when the School Board convened an executive session on April 17, 2007 with the teacher's union for the purpose of collective bargaining. The gist of your complaint is that Indiana Code 5-14-1.5-6.1(b)(2) does not allow the presence of bargaining adversaries in a strategy discussion. Therefore the bargaining session with the teacher's union was required to be held during an open meeting. You state that you attended the executive session for a short time before leaving.

I sent a copy of your complaint to the School. Superintendent Thomas W. Austin filed a response. I enclose a copy of his response for your reference. Mr. Austin's version of the facts was not materially different from your version.

After you questioned the propriety of the executive session, Mr. Austin promised to contact the Indiana School Boards Association ("ISBA") regarding whether the School Board could convene an executive session for purposes of holding collective bargaining discussions.

Mr. Austin stated that Lisa Tanselle, the ISBA attorney, told him that it was not necessary to advertise an executive session for the purpose of conducting a collective bargaining session. Further, Ms. Tanselle agreed that given the history in the school corporation that the full board had constituted the management team in the collective bargaining process, there was no need to deviate from past practice. The full board met with the negotiation team of the Elwood Classroom Teachers Association at 6:30 p.m. on April 17, 2007, to discuss the upcoming negotiation, which was scheduled to begin at 7:00 p.m. After you were introduced, and before Mr. Austin's presentation began, you announced that you believed the meeting was illegal and in violation of the Open Door Law. You then left the room. The meeting ended at 8:00 p.m.

After receiving your formal complaint from my office, Mr. Austin contacted Charles Rubright with the law firm of Bose McKinney & Evans. Mr. Rubright agreed that the executive session notice could be cancelled, but he stated that the negotiations could occur in only two possible ways. The first way would be for the full board to continue to comprise the management team, and the negotiations would be held during a public meeting. The second way requires the appointment by the superintendent of one or two board members to join the superintendent and assistant superintendent as members of the management team. The full board could hold strategy discussions with the posting of an executive session notice, but the full board could not take part in the negotiations with the teacher's association.

With that advice, Mr. Austin admits that a violation of the Open Door Law occurred on Tuesday, April 17, 2007. However, this violation was unintentional. The Board is working to finalize plans to consistently comply with the Open Door Law.

ANALYSIS

It is the intent of the Open Door Law that the official action of public agencies be conducted and taken openly, unless otherwise expressly provided by statute, in order that the people may be fully informed. Ind. Code 5-14-1.5-1. Except as provided in section 6.1 of the Open Door Law, all meetings of the governing bodies of public agencies must be open at all times for the purpose of permitting members of the public to observe and record them. IC 5-14-1.5-3(a). Section 6.1 of the Open Door Law provides the specific purposes for which an executive session may be held. IC 5-14-1.5-6.1(b). An executive session is a meeting from which the public is excluded, except the governing body may admit those persons necessary to carry out its purpose. IC 5-14-1.5-2(f).

Public notice of the date, time, and place of any meetings, executive sessions, or of any rescheduled or reconvened meeting, shall be given at least forty-eight hours (excluding Saturdays, Sundays, and legal holidays) before the meeting. Ind. Code 5-14-1.5-5(a). Public notice of executive sessions must state the subject matter by specific reference to the enumerated instance or instances for which executive sessions may be held under [IC 5-14-1.5-6.1(b)]. IC 5-14-1.5-6.1(d). A governing body may hold an executive session for any of thirteen enumerated purposes, including one for strategy discussions with respect to collective bargaining. IC 5-14-1.5-6.1(b)(2)(A). However, all such strategy discussions must be necessary for competitive or bargaining reasons and may not include competitive or bargaining adversaries. IC 5-14-1.5-6.1(b)(2)(A).

"Governing body" means two (2) or more individuals who are:

(1) a public agency that:

(A) is a board, a commission, an authority, a council, a committee, a body, or other entity; and

(B) takes official action on public business;

(2) the board, commission, council, or other body of a public agency which takes official action upon public business; or

(3) any committee appointed directly by the governing body or its presiding officer to which authority to take official action upon public business has been delegated. An agent or agents appointed by the governing body to conduct collective bargaining on behalf of the governing body does not constitute a governing body for purposes of this chapter.

IC 5-14-1.5-2(b).

As part of my investigation of your complaint, I contacted Lisa Tanselle, the attorney for ISBA. After speaking with her, I have a fuller understanding of why the School Board met on April 17 in a private meeting with the teacher's association to conduct collective bargaining, after canceling the executive session notice. According to Ms. Tanselle, there is an interpretation of the governing body definition that would allow the full board of a school corporation to appoint itself as an agent for purposes of conducting collective bargaining.

Under those circumstances, the full school board could participate in collective bargaining on its own behalf, and under IC 5-14-1.5-2(b)(3), this "committee" would not constitute a governing body for purposes of the Open Door Law. The School Board believed it was meeting in conformance with this provision on April 17, as an agent of the School Board to conduct collective bargaining. In so doing, it would not constitute a governing body for purposes of the Open Door Law.

As set forth above, one of three ways in which two or more individuals may constitute a governing body is set forth in Indiana Code 5-14-1.5-2(b)(3). A governing body means two or more individuals who are:

any committee appointed directly by the governing body or its presiding officer to which authority to take official action upon public business has been delegated. An agent or agents appointed by the governing body to conduct collective bargaining on behalf of the governing body does not constitute a governing body for purposes of this chapter.

It appears that the School Board has interpreted this provision to mean that a School Board could deem itself its own agent for purposes of collective bargaining. Reading the provision in subsection (b)(3) literally, this would mean that the School Board is not a governing body, because the provision states that an agent appointed by the governing body to conduct collective bargaining on behalf of the governing body does not constitute a governing body for purposes of the Open Door Law.

I do not think that this interpretation is correct. Reading the definition of “governing body” as a whole, subsection (b)(3) means that a committee appointed by the governing body for purposes of conducting collective bargaining on behalf of the governing body does not constitute a *committee*, one type governing body that must comply with the Open Door Law. *See, e.g., Robinson v. Indiana University, 638 N.E.2d 435 (Ind. Ct. App., 1994)* (“The legislature has clearly narrowed the scope of the Open Door Law’s effect as it applies to various *committees*” when discussing the amendment to include the word “directly” after the word “appointed.”) A School Board is a governing body under the plain language of subsection (b)(2): the board, commission, council, or other body of a public agency which takes official action upon public business.

I am not convinced that the legislature intended to allow a majority of a governing body to meet behind closed doors to conduct collective bargaining. This interpretation may have prevailed had the General Assembly placed the second sentence of subsection (b)(3) at the end of the entire subsection rather than in the paragraph describing a committee. The intent based on the placement of the second sentence was to make it clear that an agent or agents conducting collective bargaining on behalf of a governing body would not have to do so under the Open Door Law by virtue of the agents’ constituting an appointed committee of the governing body.

Hence, a committee to conduct collective bargaining negotiations with the teacher’s association could meet behind closed doors without complying with the notice and memoranda requirements of the Open Door Law so long as a majority of the School Board was not appointed to the committee. The School Board may post notice and hold an executive session for purposes of *strategy discussions* so long as the strategy discussions do not include bargaining adversaries.

Please feel free to contact me if you have any questions concerning this informal inquiry response.

Sincerely,

Karen Davis
Public Access Counselor

cc: Superintendent Thomas W. Austin